



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2007/0084**  
**Information Commissioner's Ref: FS50132169**

**Heard at Procession House, London, EC4**  
**On 29<sup>th</sup> January 2008**

**Decision Promulgated**  
**5<sup>th</sup> March 2007**

**BEFORE**

**CHAIRMAN**

**ANNABEL PILLING**

**and**

**LAY MEMBERS**

**JACQUELINE BLAKE**  
**DAVE SIVERS**

**Between**

**ANDREW DUNDAS**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL**

**Additional Party**

**Representation:**

For the Appellant: Andrew Dundas  
For the Respondent: Anya Proops  
For the Additional Party: Dyfrig Lewis-Smith

**Decision**

The Tribunal upholds the decision notice dated 26<sup>th</sup> July 2007 and dismisses the appeal.

## **Reasons for Decision**

### **Introduction**

1. This is an appeal by Mr. Andrew Dundas against a Decision Notice issued by the Information Commissioner dated 26<sup>th</sup> July 2007. The Decision Notice relates to a request for information made by Mr. Dundas to City of Bradford Metropolitan District Council (the 'Council') under the Freedom of Information Act 2000 ('FOIA').

### **Background**

2. Mr. Dundas requested information from the Council relating to a consultation exercise it had carried out when reviewing the boundaries and structure of Parish councils.
3. As part of the consultation process, a leaflet was sent out containing a "tear off" reply slip, giving the respondent an opportunity to tick a box to indicate whether or not they supported the proposal made and providing space for any comments. There was also the option for the respondent to provide their postcode, although this was marked "optional." There was no request for name or address details to be provided.
4. The Appellant believes that the scope and process of the consultation exercise were unlawful or flawed. He has been provided with much of the information he sought from the Council, either following his initial request or following his complaint to the Information Commissioner. The information still withheld represents the names and addresses (including last two letters of the postcode) of respondents. This information is withheld on the ground that the information is exempt from disclosure under section 40 of the FOIA, as it is "personal data" and to release it would contravene the first Data Protection Principle of the Data Protection Act 1988 ('DPA').

### **The request for information**

5. By letter dated 13<sup>th</sup> April 2006, Mr. Dundas made a request for information to the Council concerning the consultation exercise it had undertaken when reviewing the boundaries of Ilkley Parish Council. He stated that he was:

“...interested in the process and results of the consultation within the now reduced Ilkley Parish, that includes most addresses in the LS29 8, 9 sectors and parts of the LS29 0 sector.”

6. He requested a copy of the following:

- I) Advertisements in newspapers, and their position and dates in those named newspapers, that gave notice of those consultations.
- II) Lists of leaflets distributed to households and others in the area.
- III) Lists of streets in the areas described, where leaflets were distributed and confirmation (or otherwise) that the procedure was closely similar to the consultations about Parishes for the Burley and Menston areas.
- IV) Names and addresses of others that have received consultation leaflets other than by the 'letterbox' delivery.
- V) Certificate/confirmation from distributors that leaflets were delivered as contracted.
- VI) Each response to those consultations from within the reduced Parish area, including name and address where given.
- VII) Correspondence/emails with the Electoral Commission about the consultation and Bradford Council's recommendation for the new Parish.

7. The Council responded on 15<sup>th</sup> May 2006. It provided the information it held in response to all but two of the requests, namely requests IV and VI.

8. In relation to request IV, the Council stated that the information was exempt from disclosure under section 40 of the FOIA, as to release it would “breach the principles of the Data Protection Act”.

9. In relation to request VI, the Council provided copies of the consultation responses. However, it redacted the names, addresses and last two letters of the postcodes, where given. It withheld the name and address information in full on the grounds

that it was exempt from disclosure under section 40 of the FOIA, as in relation to request IV.

10. Mr. Dundas requested an internal review on 26<sup>th</sup> June 2006. The internal review upheld the original decision to withhold the information on the grounds that it was exempt from disclosure under section 40 of the FOIA. The outcome of the internal review was communicated to Mr. Dundas on 17<sup>th</sup> August 2006.

#### The complaint to the Information Commissioner

11. Mr. Dundas contacted the Information Commissioner on 17<sup>th</sup> August 2006 to complain about the way his request had been handled. He asked the Information Commissioner to consider whether the Council had correctly applied section 40 of the FOIA. In his complaint, Mr. Dundas indicated that he believed that the consultations were seriously flawed “and that the responses may have been made predominantly by Parish Councillors and their political allies in receipt of consultation notices not provided to other electors.”

12. The Information Commissioner conducted an investigation into the complaint. As a result of that investigation, the Council provided the following additional information to Mr. Dundas:

- a) anonymised information falling within the ambit of request IV, consisting of a list of addresses to which the consultation leaflets were sent (with the house numbers and last two letters of the postcodes redacted);
- b) copies of responses received where the address of the respondent was not provided; and
- c) information relating to organisations which had been the recipients of and respondents to the consultation, on the basis that information relating to organisations could not amount to “personal data”.

13. In the Decision Notice dated 26<sup>th</sup> July 2007, the Information Commissioner concluded:

- 1) that the Council had failed to comply with section 1 of the FOIA (the general right to information) in that in relation to requests IV and VI it had incorrectly applied the exemption in section 40 of the FOIA to the consultation responses and the names and addresses submitted by organisations. This information had since been disclosed and no further steps were required; and
- 2) that the Council had complied with section 1 of the FOIA in relation to requests IV and VI by correctly withholding the names and addresses of (a) those persons who were sent consultation leaflets other than by letterbox delivery and (b) those persons who had provided their details when responding to the consultation. This information was “personal data” for the purposes of section 1 of the DPA and disclosure of that information would have breached the Data Protection Principles, particularly the first Data Protection Principle as it would have resulted in an unwarranted invasion of privacy of individual respondents and accordingly would have amounted to unfair and unlawful processing.

14. The Information Commissioner also highlighted as matter of concern the failure of the Council to provide Mr. Dundas with the opportunity to indicate whether he wished to receive information that could not positively be identified as falling within the postcode boundaries specified in his original request.

#### The appeal to the Tribunal

15. Mr. Dundas appealed to the Tribunal on 15<sup>th</sup> August 2007.

16. The grounds of appeal can be summarised as follows:

- 1) the withheld information did not amount to “personal data” and did not, therefore, fall within the scope of the exemption set out in section 40 of the FOIA;
- 2) even if that information did amount to “personal data”, it would not have been a breach of the Data Protection Principles to disclose it.

17. The Tribunal joined the Council as an additional party.

18. The appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.
19. Mr. Dundas submitted “Confidential Submissions” a day or so before the appeal was determined. No Direction had been made or sought for the provision of submissions to be made without being disclosed to the other parties. These were not considered as part of the appeal hearing, although on a brief perusal they appear to amount to background and allegations of errors in the consultation process which would not be relevant to the appeal in any event.
20. In addition, the Tribunal was provided with a copy of the withheld information. This was not made available to Mr. Dundas, as to disclose it to him would defeat the purpose of this appeal.
21. Although the Tribunal may not refer to every document in this Decision, we have considered all the material placed before us.

### The Powers of the Tribunal

22. The Tribunal’s powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

*(1) If on an appeal under section 57 the Tribunal considers-*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

23. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

24. The question of whether the information amounts to “personal data” and whether the exemption in section 40 of the FOIA is engaged and whether disclosure would breach a Data Protection Principle are all questions of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

#### The questions for the Tribunal

25. The Tribunal has concluded that the relevant issues in this appeal are as follows:

- 1) What information is still being sought/withheld?
- 2) Is that information “personal data”?
- 3) If that information is “personal data”, would disclosure breach any of the Data Protection Principles?

26. As a preliminary issue, it was necessary to clarify exactly what information was still being sought/withheld as a question had arisen as to whether the request to be provided with the last two letters of the postcode amounted to a further request for information not covered by the original request. We were satisfied that the disputed



information is that identified by Mr. Dundas at paragraph 15 of his Grounds of Appeal document:

- i) the names and addresses of those individuals who were sent consultation leaflets other than by letterbox delivery;
- ii) the names and addresses of those individuals who responded to the consultation; and
- iii) the full postcodes, where given, of those who responded to the consultation where they did not give their names and addresses.

27. We consider that the original request for names and addresses included within its ambit the full postcodes, including the last two letters.

28. The Council had provided Mr. Dundas with a redacted copy of a delivery “back-check” that the distribution company had completed. The redacted parts were the names or signatures of the householders. It appeared from his written submissions that Mr. Dundas is also appealing against the withholding of that redacted information.

#### Legal submissions and analysis

29. A public authority need not comply with the duty to disclose under section 1 of the FOIA where any of the absolute exemptions provided for by FOIA apply. Section 40 of the FOIA is an absolute exemption.

30. Section 40 of the FOIA provides as follows:

*(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if-*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or second condition below is satisfied.*

*(3) The first condition is-*

*(a) in a case where the information falls within any of the paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*

*(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*

*(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).*

#### Definition of “personal data”

31. The FOIA incorporates the definition of “personal data” found in section 1(1) of the DPA:

*“personal data” means data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*

32. The DPA gives effect to Directive 95/46/EC of October 1995 on The Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (the '1995 Directive') and this has a bearing on how the DPA should be interpreted.

33. Article 2(a) of the 1995 Directive defines "personal data" as

*"...any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."*

34. It is not necessary or helpful to repeat in detail the lengthy submissions of the parties in relation to how the definition of "personal data" should be interpreted.

35. The Appellant submits that this definition requires three elements to be combined before data can amount to "personal data": identification, third party opinion and the intentions about a living individual. In essence, he argues that the definition should be read conjunctively and unless each of the elements outlined were present, information could not amount to "personal data" for the purposes of the FOIA or the DPA. He submits that the Guidance provided by the Office of the Information Commissioner is a "wholly inaccurate and misleading guide to the law".

36. The Information Commissioner and the Council both submit that Mr. Dundas has misinterpreted the structure and requirements of section 1 of the DPA. They submit that the use of the term "includes" is intended to be permissive, to allow for a broad definition of personal data.

37. The Information Commissioner also submits that to interpret the definition in section 1 of the DPA as broadly as Mr. Dundas suggests would be inconsistent with Article 2 of the 1995 Directive (*supra*).

38. It appears to the Tribunal that Mr. Dundas misunderstood the law and should, perhaps, have been given additional guidance on this point at an earlier stage.

39. We are satisfied that the definition of “personal data” has been drafted, and should be interpreted, broadly. The words “and includes” is inclusive rather than conditional. The purpose of that definition is to make it clear that both opinion and statement of intent (as well as details such as names, addresses etc) *can* be considered “personal data” but are not required elements that must always be present for information to be considered to fall into this category.

40. With this broad definition in mind, we turn to consider whether the disputed information is “personal data”.

Is the disputed information “personal data”?

41. What makes data “personal” is whether living individuals can be identified from it. In some instances this is a straightforward question (for example, a name) but in other instances this can be more complex.

42. Our attention was drawn to a number of authorities, although these were not actually provided to us. In particular we were asked to consider the comments made by Auld LJ in the Court of Appeal in the leading case of Durant v FSA [2003] EWCA Civ.1746 “...there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject’s involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person’s or body’s conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity...” ( at para 28)

43. The consultation leaflets were clearly intended to be anonymous, as names and addresses were not required from respondents; there was simply the option of

providing the postcode if the respondent wished. We note that there was no data protection information given on the leaflet and, in particular, no warning that the information provided might be disclosed in the future. The respondents may well have assumed, therefore, that the information provided would be used for the purposes of the consultation only.

44. We have already identified the four categories of the disputed information and now consider each in turn.

*Names and addresses of those individuals who were sent consultation leaflets other than by letterbox delivery*

45. Mr. Dundas has now been provided with, in each case, the address, less the house number and last two letters of the postcode. There can be no dispute that a name amounts to “personal data”. The question of whether an address alone can amount to “personal data” would depend on the circumstances.

46. Although Mr. Dundas submits that more than just identifying information is needed for information to be regarded as “personal data”, we have rejected that submission.

47. Data is “personal” if a living individual can be identified from it, and he can be identified even if his name is not known. In this instance, the full address information would disclose that individuals residing at a particular address had been sent the consultation leaflet other than by letterbox delivery, that is, by request or some other means. We note that in his own written submissions Mr. Dundas concedes that “postcodes are a normal part of address information that identifies individuals.”

48. We therefore conclude that this category of disputed information amounts to “personal data”.

*The names and addresses of those individuals who responded to the consultation*

49. Although Mr. Dundas has been provided with the actual responses to the consultation, he has confirmed that he requests the names and addresses of those who responded. There can be no dispute that the name of a respondent amounts to personal data. An address alone would, in this instance, amount to “personal

data” as it would reveal that a person residing at that address had responded to the consultation exercise.

50. We therefore conclude that this category of disputed information amounts to “personal data”.

*The full postcodes, where given, of those who responded to the consultation where they did not give their names and addresses.*

51. We consider the postcode to be part of the address and therefore part of the information that fell within the original request VI. We do not accept the Council’s submission that Mr. Dundas’ request to be provided with this information as a further or new request. But rather it has been raised as an “alternative” request as some redacted address information has been withheld.

52. In relation to postcodes, the parties accept that these are “Royal Mail’s inventions that identify groups and tiers of addresses.” The postcode is comprised of two halves. The first half is the out bound postcode and identifies the post town. The second half is the inbound postcode and will identify an actual address or addresses.

53. In built up areas, one postcode may identify a number of separate residences. We note that, in rural areas, one postcode may relate to a large geographical area, but only a few residences and may even, in some instances, identify only one property or residence. There may be cases, therefore, where the full postcode identifies one address and one individual. While in many cases the full postcode would identify a relatively small number of addresses, but not just one individual, a small inclusive group of individuals would be identified. We have already noted (*supra*) that in his own written submissions Mr. Dundas concedes that “postcodes are a normal part of address information that identifies individuals.”

54. Without further investigation and detailed evidence, it is not possible to know whether the last two letters of the postcodes that have been withheld from Mr. Dundas identify more than one address. Although the Council have a duty to assist Mr. Dundas under the FOIA, this duty does not, in our opinion, extend to this onerous task.

55. It is clear from the material we have seen that Mr. Dundas is seeking this information to identify individuals who responded to the consultation process. While the FOIA is “motive blind”, the Council submits that we should consider the wider implications in relation to the issue of disclosing the full postcode. The Council submits that the postcodes fall within part (b) of the definition of “personal data”: that is, it relates to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

56. We consider that the full postcode, that is the last two letters, would be sufficient for a living individual to be identified and we consider that the postcodes, in this instance, fall within part (a) of the definition of “personal data”.

57. We therefore conclude that this category of disputed information amounts to “personal data”.

*The unredacted copy of the delivery “back-check”*

58. The information redacted is the name or signature of the relevant householder. We consider that there can be no dispute that this information amounts to “personal data”.

Would disclosure contravene any of the Data Protection Principles?

59. The Data Protection Principles are contained in Part I of Schedule 1 of the DPA. The relevant part of first Data Protection Principle states that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*

*(a) at least one of the conditions in Schedule 2 is met;*

60. “Processing” is defined in section 1 of the DPA and includes “disclosure of the information or data by transmission, dissemination or otherwise making available.”

61. Mr. Dundas submits that “at least” one of the conditions in Schedule 2 is met and has identified four conditions that he submits would mean that the disclosure of the information amounted to fair and lawful processing, that the Data Protection

Principles would not be contravened and that, therefore, the exemption under section 40 of the FOIA was not engaged.

62. Again, we received lengthy submissions on these issues and we do not consider it necessary to rehearse them in any detail in our Decision.

Sch.2, para.5(a) Processing is necessary for the administration of justice

63. Mr. Dundas submits that the information is “required for the administration of justice by establishing whether misrepresentations have been made.” He argues that reasonable grounds exist for suspecting that the consultation process was not properly conducted. In particular, he challenges whether the large number of leaflets that should have been distributed were in fact delivered. He also “hypothesises” that a large number of the claimed responses were from insiders of the Councils to whom the consultation leaflets were provided by means other than the letterbox delivery.

64. We are not satisfied that Mr. Dundas is carrying out any function that could properly be regarded as administering justice. He is not a court or tribunal or an investigative authority. He is a private individual, a member of the public, who seeks the disclosure of information that he believes may assist him in challenging what he perceives as the unlawful changes to Parish boundaries.

65. We do not consider that this condition is met.

Sch.2, para.5(c) Processing is necessary for the exercise of any functions of the Crown, a Minister of the Crown or a government department

66. Mr. Dundas submits that the Electoral Commission (‘EC’) and the Office of the Deputy Prime Minister (‘ODPM’) may have been misled in their functions of approving the proposals for Parish electoral arrangements. He submits that information about the identities of respondents to the consultation process to “support a demonstration to the EC and ODPM that their functions of approving the electoral arrangements and new parishes were subverted.”

67. We do not consider that Mr. Dundas is carrying out any function of the Crown, a Minister of the Crown or a government department. As mentioned above, we note



that Mr. Dundas is a private individual, a member of the public, who seeks the disclosure of information that he believes may assist him in challenging what he perceives as the unlawful changes to Parish boundaries.

68. We do not consider that this condition is met.

Sch.2, para.5(d) Processing is necessary for the exercise of any other functions of a public nature exercised in the public interest by any person

69. Mr. Dundas submits that he is “any person” and that the “function of a public nature exercised in the public interest” is securing consultation about lawful electoral arrangements in his Parish.

70. The Council concedes that it is unarguable that electoral equality is a matter of public interest and that Mr. Dundas might be “championing” a genuinely-held grievance amongst members of the public.

71. We do not consider that Mr. Dundas is exercising a public function. As mentioned above, we note that Mr. Dundas is a private individual, a member of the public, who seeks the disclosure of information that he believes may assist him in challenging what he perceives as the unlawful changes to Parish boundaries.

72. We do not consider that this condition is met.

Sch.2, para.6(1) Processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party of parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject

73. This condition was considered in some detail by a differently constituted panel of this Tribunal in The Corporate Officer of the House of Commons v The Information Commissioner (EA/2006/0015 and 0016) and, although we are not bound by that decision, we accept the key principles as identified by the Information Commissioner in the written submissions before us:

- i) as a general rule, the interests of the data subject must be judged to be paramount under the DPA, although that general rule may be disapplied in respect of data subjects who are public officials particularly where the disputed information relates to the performance of their public duties;
- ii) the exercise of balancing the interests of the proposed third party recipient as against those of the data subject is comparable to the balancing exercise required under the public interest test provided for in section 2 of the FOIA; and
- iii) disclosure will only be “necessary” for the purposes of paragraph 6 where the third party’s legitimate interests in disclosure outweighs, or is greater than, the prejudice to the rights and freedoms or legitimate expectations of the data subject.

74. Mr. Dundas has raised a number of matters that he submits amount to “reasonable grounds” to conclude that the scope and process of the consultation exercise were unlawful or flawed. The only “legitimate interest” he could be regarded as having amounts merely to speculation as to the propriety of the consultation.

75. Without making a finding as to whether that does amount to a “legitimate interest” for these purposes, in any event we are not satisfied that disclosure of the disputed information would be “necessary” for the purposes of that interest. We agree with the submissions of the Information Commissioner and the Council that other complaint procedures could be utilised by Mr. Dundas without the need for the disclosure of “personal data”.

76. We also consider that those who responded to the consultation would reasonably expect their responses to remain confidential (and we note again that there was the option to provide simply their postcode and the absence of any data protection warning). Respondents voluntarily provided information and it is not helpful to regard the information as being akin to the electoral roll. The Disclosure of the information might lead to the individuals being contacted which may be regarded as an unwarranted intrusion into their private lives.

77. We are not satisfied that Mr. Dundas' interests in seeking the information outweigh the legitimate interests of the data subjects, that is, the respondents to the consultation leaflet.

78. We do not consider that this condition is met.

79. We therefore do not consider that any of the conditions in Schedule 2 are met. Disclosure of the information would not be fair and lawful and would contravene the first Data Protection Principle.

### Conclusion and remedy

80. A number of points have been raised by Mr. Dundas that have had no direct bearing on this appeal and are not within the jurisdiction of this Tribunal. In particular, we cannot comment on any of his substantive complaints about the quality of the consultation process.

81. For the reasons set out above, we have concluded that all the disputed information is "personal data" and that to disclose it would contravene the first Data Protection Principle. The exemption in section 40(2) of the FOIA is therefore engaged and this is an absolute exemption from disclosure. The Tribunal dismisses the appeal.

82. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman

Date 8th February 2008